

AMENDED IN ASSEMBLY APRIL 13, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1351**

**Introduced by Assembly Member Vargas**

February 22, 2005

---

An act to amend Section 11340.5 of, *and to add Section 11342.620 to*, the Government Code, relating to state agencies, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 1351, as amended, Vargas. Office of Administrative Law: regulations.

Existing law prohibits a state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, unless it has been adopted as a regulation and filed with the Secretary of State. Under existing law, if the Office of Administrative Law is notified, or learns on its own, that an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has not been adopted as a regulation and filed with the Secretary of State, the office may issue a determination as to whether it is a regulation.

~~This bill would require the office in making its evaluation to give priority to matters affecting a large number of people and having a significant fiscal implication for the state~~ *provide that any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is a regulation but is not adopted as a regulation and filed with the Secretary of State constitutes an "underground regulation" and would establish a procedure for any interested person with information that a state agency has issued,*

*used, enforced, or attempted to enforce an underground regulation to petition the Office of Administrative Law for a determination that this agency action is an invalid underground regulation. It would require the office, within 15 days after receiving a petition, to determine whether the petition raises an issue of considerable public importance requiring prompt resolution and would make this determination final and not subject to judicial review. It also would provide that, if the office determines that a petition raises an issue of considerable public importance requiring prompt resolution, then the office is required, within a specified time after public notice and comments, to determine whether the agency action is an underground resolution and therefore invalid.*

~~This bill would appropriate \$234,000 to the Office of Administrative Law from the General Fund for these purposes.~~

Vote:  $\frac{2}{3}$ -majority. Appropriation: ~~yes-no~~. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 ~~SECTION 1. Section 11340.5 of the Government Code is~~  
2 ~~amended to read:~~

3 *SECTION 1. Section 11340.5 of the Government Code is*  
4 *amended to read:*

5 11340.5. (a) No state agency shall issue, ~~utilize~~ *use*, enforce,  
6 or attempt to enforce any ~~guideline, criterion, bulletin, manual,~~  
7 ~~instruction, order, standard of general application, or other rule,~~  
8 ~~which is a regulation as defined in Section 11342.600, unless the~~  
9 ~~guideline, criterion, bulletin, manual, instruction, order, standard~~  
10 ~~of general application, or other rule has been adopted as a~~  
11 ~~regulation and filed with the Secretary of State pursuant to this~~  
12 ~~chapter~~ *underground regulation as defined in Section 11342.620.*

13 (b) ~~If the office is notified of, or on its own, learns of the~~  
14 ~~issuance, enforcement of, or use of, an agency guideline,~~  
15 ~~criterion, bulletin, manual, instruction, order, standard of general~~  
16 ~~application, or other rule that has not been adopted as a~~  
17 ~~regulation and filed with the Secretary of State pursuant to this~~  
18 ~~chapter, the office may issue a determination as to whether the~~  
19 ~~guideline, criterion, bulletin, manual, instruction, order, standard~~  
20 ~~of general application, or other rule, is a regulation as defined in~~  
21 ~~Section 11342.600.~~

1 ~~(e) The office shall do all of the following:~~

2 (b) Any interested person with information that a state agency  
3 has issued, used, enforced, or attempted to enforce an  
4 underground regulation as defined in Section 11342.620 may  
5 petition the office for a determination that a particular guideline,  
6 criterion, bulletin, manual, instruction, order, standard of  
7 general application, or other rule is an underground regulation  
8 and, therefore, invalid, and that the state agency shall withdraw  
9 and cease immediately to use, enforce, or attempt to enforce the  
10 underground regulation. The petition shall include all of the  
11 following:

12 (1) The name and contact information of the petitioner.

13 (2) The name and contact information of the agency that has  
14 allegedly issued, used, enforced, or attempted to enforce an  
15 underground regulation.

16 (3) A complete description of the underground regulation, and  
17 a copy of any written expression of the underground regulation.

18 (4) A description of the actions of the state agency evidencing  
19 that it has issued, used, enforced, or attempted to enforce the  
20 underground regulation.

21 (5) The legal basis for concluding that the guideline, criterion,  
22 bulletin, manual, instruction, order, standard of general  
23 application, or other rule is a regulation as defined in Section  
24 11342.600 and that no exceptions to the requirements of this  
25 chapter are applicable.

26 (6) Information demonstrating that the petition raises an issue  
27 of considerable public importance requiring prompt resolution.

28 (c) Upon the filing of the petition, the petitioner shall submit a  
29 copy of the petition and all attachments to the agency alleged to  
30 have issued, used, enforced, or attempted to enforce an  
31 underground regulation.

32 (d) (1) Within 15 days after receiving a petition filed pursuant  
33 to subdivision (b), the office shall determine whether the petition  
34 raises an issue of considerable public importance requiring  
35 prompt resolution. If the office determines that the petition fails  
36 to raise an issue of considerable public importance requiring  
37 prompt resolution, the office shall issue that determination to the  
38 petitioner and to the agency alleged to have issued, used,  
39 enforced, or attempted to enforce an underground regulation. A  
40 determination by the office that the petition fails to raise an issue

1 *of considerable public importance requiring prompt resolution is*  
2 *final and is not subject to judicial review.*

3 *(2) If the office determines that the petition raises an issue of*  
4 *considerable public importance, it shall notify the petitioner and*  
5 *the agency alleged to have issued, used, enforced, or attempted*  
6 *to enforce an underground regulation of its determination and*  
7 *publish the petition or a summary of the petition in the California*  
8 *Regulatory Notice Register, giving notice to the public that*  
9 *comments on the subject of the petition may be submitted to the*  
10 *office within 30 days after publication of the notice. The agency*  
11 *alleged to have issued, used, enforced, or attempted to enforce an*  
12 *underground regulation may submit to the office a response to*  
13 *the petition within 30 days after publication of the notice and*  
14 *shall serve a copy of any response to the petition on the*  
15 *petitioner. The office shall make the comments that it receives*  
16 *available to the petitioner. The petitioner may submit a reply to*  
17 *the agency's response within 15 days after being served with that*  
18 *response.*

19 *(3) No later than 45 days after the time for the petitioner to*  
20 *submit a reply to the agency's response, the office shall issue a*  
21 *determination as to whether or not the guideline, criterion,*  
22 *bulletin, manual, instruction, order, standard of general*  
23 *application, or other rule is an underground regulation and,*  
24 *therefore, invalid, and that the agency shall withdraw and cease*  
25 *immediately to use, enforce, or attempt to enforce the*  
26 *underground regulation, setting out the basis for its*  
27 *determination.*

28 *(e) Upon issuing a determination pursuant to paragraph (3) of*  
29 *subdivision (d), the office shall do all of the following:*

30 *(1) File its determination ~~upon issuance~~ with the Secretary of*  
31 *State.*

32 *(2) Make its determination known to the agency, the*  
33 *Governor, and the Legislature.*

34 *(3) Publish its determination in the California Regulatory*  
35 *Notice Register within 15 days of the date of issuance.*

36 *(4) Make its determination available to the public and the*  
37 *courts.*

38 ~~(d)~~

39 *(f) Any interested person may obtain judicial review of a ~~given~~*  
40 *determination issued pursuant to paragraph (3) of subdivision*

(d) by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

(e)

(g) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

(1) The court or administrative agency proceeding involves the party that sought the determination from the office.

(2) The proceeding began prior to the party's request for the office's determination.

(3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in Section 11342.600 or an underground regulation as defined in Section 11342.620.

SEC. 2. Section 11342.620 is added to the Government Code, to read:

11342.620. "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is a regulation as defined in Section 11342.600, but has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

~~11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, that is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.~~

~~(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the~~

1 ~~guideline, criterion, bulletin, manual, instruction, order, standard~~  
2 ~~of general application, or other rule, is a regulation as defined in~~  
3 ~~Section 11342.600.~~

4 ~~(e) In evaluating whether to issue a determination pursuant to~~  
5 ~~this section, the office shall give priority to the following:~~

6 ~~(1) Matters affecting a large number of people.~~

7 ~~(2) Matters with significant fiscal implications for the state.~~

8 ~~(d) If the office elects to issue a determination pursuant to this~~  
9 ~~section, it shall do all of the following:~~

10 ~~(1) File its determination upon issuance with the Secretary of~~  
11 ~~State.~~

12 ~~(2) Make its determination known to the agency, the~~  
13 ~~Governor, and the Legislature.~~

14 ~~(3) Publish its determination in the California Regulatory~~  
15 ~~Notice Register within 15 days of the date of issuance.~~

16 ~~(4) Make its determination available to the public and the~~  
17 ~~courts.~~

18 ~~(e) Any interested person may obtain judicial review of a~~  
19 ~~given determination by filing a written petition requesting that~~  
20 ~~the determination of the office be modified or set aside. A~~  
21 ~~petition shall be filed with the court within 30 days of the date~~  
22 ~~the determination is published.~~

23 ~~(f) A determination issued by the office pursuant to this~~  
24 ~~section shall not be considered by a court, or by an administrative~~  
25 ~~agency in an adjudicatory proceeding if all of the following~~  
26 ~~occurs:~~

27 ~~(1) The court or administrative agency proceeding involves the~~  
28 ~~party that sought the determination from the office.~~

29 ~~(2) The proceeding began prior to the party's request for the~~  
30 ~~office's determination.~~

31 ~~(3) At issue in the proceeding is the question of whether the~~  
32 ~~guideline, criterion, bulletin, manual, instruction, order, standard~~  
33 ~~of general application, or other rule that is the legal basis for the~~  
34 ~~adjudicatory action is a regulation as defined in Section~~  
35 ~~11342.600.~~

36 ~~SEC. 2. The sum of two hundred thirty-four thousand dollars~~  
37 ~~(\$234,000) is hereby appropriated from the General Fund to the~~  
38 ~~Office of Administrative Law for the purposes of this act.~~

1 -

O